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PLAINTIFF'S
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DEFENDANT'S
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1 (Hearing commenced at 10:43 a.m.)

2 THE CLERK: In case number 2:05cv205, Inline
3 Connection Corporation versus Verizon Internet Services,
4 Inc., et al.

5 Mr. Noona, Mr. Plimack, is the plaintiff ready to
6 proceed?

7 MR. NOONA: We are.

8 THE CLERK: Mr. McFarland and Mr. Wyss, are the
9 defendants ready to proceed?

10 MR. MCFARLAND: The defendants are ready, Your
11 Honor.

12 THE COURT: All right. We are here on the
13 defendant's motion, so I'll hear from the defendants first.

14 MR. MCFARLAND: Thank you, Your Honor. May it
15 please the Court. Robert McFarland on behalf of the moving
16 Verizon defendants. Your Honor, let me introduce my
17 co-counsel, John Wyss, from the Wiley Rein firm, and also
18 with us is Mr. Lynn Suchyta who is in-house counsel for
19 Verizon.

20 We appreciate the Court hearing us on this matter.
21 We come, as the Court has noted, on our motion to transfer
22 venue from the moving Verizon defendants from this court to
23 the District of Delaware. And I submit to the Court,
24 recognizing the burden that we face on a transfer motion, it
25 is nonetheless plain that the only logical action for this

1 Court to take is to transfer this court to Delaware where it
2 was originally filed over three years ago.

3 THE COURT: Verizon is an internet service provider,
4 correct?

5 MR. McFARLAND: That's correct, Your Honor. There
6 are really two Verizon internet service providers: VIS,
7 Verizon Information Services, and GTE Net.

8 THE COURT: Are they both defendants in Delaware?

9 MR. McFARLAND: Yes, Your Honor. They are both
10 Delaware corporations and --

11 THE COURT: They are defendants in the Delaware
12 action?

13 MR. McFARLAND: Oh, no, Your Honor, they are not
14 defendants in the Delaware action.

15 THE COURT: So there are two other internet service
16 providers who are defendants in the Delaware action?

17 MR. McFARLAND: That's correct.

18 THE COURT: And Verizon was dismissed because
19 apparently they have the wrong corporate entities?

20 MR. McFARLAND: That is exactly correct, Your Honor.

21 THE COURT: But they didn't bring Verizon back in
22 after that happened?

23 MR. McFARLAND: That is exactly right, Your Honor.
24 They sued Verizon Communications, Inc., originally over three
25 years ago in 2002 at the same time the plaintiffs sued AOL

1 and Earth Link. They then, after Verizon Communications
2 moved for summary judgment -- and it's critical that they
3 moved for summary judgment, Your Honor, on the basis of
4 subject matter jurisdiction, not personal jurisdiction,
5 because they could not be brought before that court on a
6 personal jurisdiction basis but on the basis of subject
7 matter jurisdiction because that company is nothing but a
8 holding company and simply doesn't do what, for example, an
9 AOL or an Earth Link does as internet service provider.

10 THE COURT: All right. Well, presumably, they are
11 incorporated in Delaware. So are you telling me that there's
12 no issue that they are amenable to the jurisdiction of the
13 Delaware court?

14 MR. McFARLAND: That's correct.

15 THE COURT: The plaintiff has not elected to join?

16 MR. McFARLAND: That's correct, Your Honor. No
17 question that the two Verizon entities, who are the proper
18 defendants in this action, the ISPs, the internet service
19 providers, the VIS and GTE Net, are both Delaware
20 corporations plainly amenable to jurisdiction in Delaware.

21 THE COURT: All right. Now, the so-called OTCs,
22 only two of those are subject to jurisdiction in Delaware?

23 MR. McFARLAND: That's correct, Your Honor. Which
24 is the same number that would be subject to jurisdiction in
25 this court. There are only two --

1 THE COURT: We haven't gotten to jurisdiction yet.

2 MR. McFARLAND: Correct, but I'm just saying --

3 THE COURT: Now, the OTCs simply furnish the -- I'm
4 not a computer expert so you'll have to bear with me, but the
5 OTCs simply provide the means of transmitting the services to
6 the consumer?

7 MR. McFARLAND: That's correct.

8 THE COURT: They don't provide the offending
9 services --

10 MR. McFARLAND: That's correct.

11 THE COURT: -- initially. They just transport,
12 let's say, the offending services of the internet provider to
13 the consumer? That's what they do?

14 MR. McFARLAND: Yes. That is exactly right, Your
15 Honor.

16 THE COURT: Well, what about --

17 MR. McFARLAND: And that's why the OTCs are not a
18 necessary party to this litigation. If they had been a
19 necessary party, they'd already be in the two Delaware cases.
20 In other words, the two Verizon entities that are clearly
21 necessary, VSI and GTE Net, they're ISPs, just like AOL and
22 Earth Link. This litigation over the exact same four, and
23 soon to be five, patents is going on in Delaware without any
24 OTCs whatsoever in the case.

25 THE COURT: There are only two defendants in the

1 case?

2 MR. MCFARLAND: There is one defendant in each case,
3 that's correct, AOL and Earth Link, the ISPs.

4 THE COURT: There are two separate cases?

5 MR. MCFARLAND: Two separate cases essentially
6 consolidated, at least coordinated, and in both of those
7 cases, Your Honor, there are no OTCs as defendants, which
8 indicates that the OTCs are really not a necessary party. In
9 fact, pursuant to the Delaware courts, claim construction --
10 I believe the claims construction done to date in that case
11 would indicate that the OTCs would not be infringers of the
12 ASDL.

13 THE COURT: There are too many initials. What is an
14 ASDL?

15 MR. MCFARLAND: That is what is at issue in this
16 case, Your Honor. That is the Asymmetric Digital Subscriber
17 Line, the high speed internet access that's at issue here.
18 And if I said ASDL, I should have said ADSL. But I think it
19 is very telling, Your Honor, that the same plaintiff for all
20 three cases not only brought suit against a Verizon entity in
21 2002 in Delaware, but has continued to litigate for over
22 three years against only the internet service providers.

23 So if the OTCs were really necessary parties, either
24 they would have been sued initially, or at a minimum there
25 would have been a motion to join them. In fact, the OTCs are

1 not necessary parties, Your Honor. They are brought in this
2 case as a red herring to try and divert this Court from what
3 is plainly the appropriate action, and that is to transfer
4 this case, which is incredibly complex.

5 We have right now four patents at issue in a highly
6 technological area. I understand the plaintiffs want to add
7 a fifth patent, so that I believe it's 178 claims are open
8 for construction presently. There would be 39 new claims
9 brought with a fifth patent --

10 THE COURT: Sounds like a very interesting case.

11 MR. MCFARLAND: It is interesting, Your Honor, in
12 some sense, but it is interesting that it has been proceeding
13 for three and a half years in Delaware, and only now in 2005,
14 after originally agreeing that Delaware was the appropriate
15 forum, not only for AOL and Earth Link but for Verizon, does
16 the plaintiff come back and want to add -- excuse me, want to
17 file now in this court and force this court to undergo the
18 extensive, first off, discovery, as one might expect for
19 three and a half years of litigation. There are incredible
20 discovery that's gone on in this case with all kinds of
21 discovery rulings, and there has already been claims
22 construction. There has been Markman hearings in the
23 Delaware case.

24 Plaintiffs are asking this Court to have to step in
25 new and come up to speed and learn what has been going on for

1 three and a half years when there is a court that has already
2 dealt with all these issues. And there is no question, Your
3 Honor, that jurisdiction is appropriate in Delaware, and I
4 recognize that's the first thing this Court has to look at,
5 is jurisdiction appropriate in Delaware, could this case have
6 been brought in Delaware, and plainly it could have.

7 Not only are the two ISPs, Verizon ISPs amenable to
8 jurisdiction in Delaware, but we don't think they're
9 necessary, but the second level of defendants, what are
10 called the service companies, they are also Delaware entities
11 and can be subject to suit and certainly proceed there in
12 Delaware.

13 And then we get to there is a third level of
14 defendants that we don't think has anything to do with this
15 case, those are general service providers, such as Verizon,
16 that deals with such things as human resources benefits, that
17 kind of thing. I don't think they're properly in this case,
18 but they're all Delaware companies, as well.

19 It is only when we get to the OTCs who really don't
20 need to be in this case whatsoever that then of the 18 OTCs
21 who have been sued, two are admittedly Virginia entities, but
22 they have nothing to do with what's really going on here.

23 THE COURT: Well, I mean, in the more common
24 situation where a manufacturer would be suing another
25 manufacturer for patent infringement, the retailers are

1 considered infringing?

2 MR. McFARLAND: They are, Your Honor, but there is a
3 major difference. For example, in the case, Your Honor had
4 the Brown situation where there were the sort of downstream
5 merchants who were selling the allegedly offending product.
6 There you've got either a direct sales situation, right, I go
7 into a merchant who is offending only in the sense that he is
8 selling the product, and you've got a one-on-one
9 relationship.

10 That isn't the case here with the OTCs. The OTCs
11 are your basic local phone company, and the OTCs do not
12 contract with the person, the subscriber who wants this
13 service. The internet service provider contracts directly
14 with the consumer here. The OTC is simply serving as a
15 conduit for perhaps one element of the service. But there is
16 no -- unlike even in the merchant relationship that Your
17 Honor dealt with in Brown, with the downstream merchant that
18 the Court felt was nonetheless removed enough that it could
19 be severed, in this case there is no direct relationship, no
20 contractual relationship, no direct relationship between the
21 consumer subscriber and the entity that's allegedly providing
22 the allegedly offending product, the ISP. It's the ISP who
23 contracts. So that's why, Your Honor, the OTCs are not
24 necessary --

25 THE COURT: Well, what are you asking me to do,

1 dismiss them?

2 MR. McFARLAND: Yes, Your Honor.

3 THE COURT: As opposed to stay the proceedings?

4 MR. McFARLAND: You could stay the proceedings, Your
5 Honor, and wait to see what happens in Delaware. That would,
6 I think, be acceptable, as well, or you could dismiss them
7 without prejudice and see if there's ever any indication by
8 Inline that they want to renew that litigation. I suspect
9 there will not be. It's gone on for three and a half years
10 in Delaware without a single OTC being a defendant.

11 Hard to believe that they are somehow a necessary
12 party in this case, but I do say, Your Honor, that absolutely
13 this Court needs to transfer the bulk of this case, what is
14 the crux of this case, the allegations against the ISPs to
15 the court that has dealt with it for three and a half years.

16 THE COURT: Maybe that's why they want to because
17 they have been dealing with it for three and a half years.

18 MR. McFARLAND: There is no question that is why
19 they want it here, Your Honor. That is the only reason. I
20 mean, if you step back and think about it, why else would a
21 plaintiff --

22 THE COURT: Well, that is one of the considerations
23 in the motion to transfer is the condition of the docket.

24 MR. McFARLAND: The docket is one thing, Your Honor,
25 and that is a consideration. We acknowledge that. But what

1 the plaintiff is asking in this case is to try and beat a
2 case, that's been going on in Delaware for three and a half
3 years, to trial to see if they can get one ruling here versus
4 perhaps what appears to be the ruling that they are going to
5 get in Delaware where they've already lost partial summary
6 judgment, they've already had claims construction and Markman
7 hearings that went against them, as well as discovery
8 rulings. That's not appropriate.

9 In fact, I think it's the DataServices case, the
10 judge there, dealing with almost the exact same situation
11 with two districts in Texas, acknowledges what should not
12 occur is a race to the courthouse to see who can get to trial
13 first, particularly in the patent area where you are dealing
14 with such technical and complex subject matter and there is a
15 chance for inconsistent rulings.

16 The Delaware court makes one claim construction.
17 Then plaintiffs are asking this court to make essentially
18 another claim construction ruling. That would mean that
19 theoretically you could have two appeals going up to the
20 Federal Circuit on claim constructions of the same patent.
21 That's not advisable.

22 And the only reason the plaintiffs are here in
23 Virginia, after they first filed suit against my client's
24 holding company in Delaware, is because they don't like
25 what's happened in Delaware. That can be the only

1 explanation. It can't be that Delaware's an inconvenient
2 forum for them. My goodness, they've been litigating there
3 for three and a half years. It can't be that they can't get
4 access to the sources of proof for the witnesses. In fact,
5 virtually all the critical witnesses are based in D.C., New
6 Jersey, New York or Pennsylvania, which is somewhat closer,
7 obviously, to Delaware than it is to Norfolk. So that's not
8 the reason.

9 It can't be that they can't get jurisdiction over my
10 clients. We've acknowledged we are absolutely amenable to
11 suit in Delaware. What is the only reason that the plaintiff
12 now brings this case here having originally filed it three
13 and a half years ago in Delaware?

14 The only reason is they don't like what's going on
15 in Delaware. That is not a basis for this Court to have to
16 wade through everything that's been going on for three and a
17 half years to deal with the discovery issues, potentially
18 inconsistent rulings, et cetera, when there's a court in
19 Delaware that's already done this and has the expertise, has
20 the familiarity to do it.

21 Let me just point this out, Your Honor. There has
22 been limited discovery, and I say limited because we don't
23 think we've gotten what we're entitled to, but there have
24 been some exchange of discovery, and we got copies of some
25 e-mails in which before the plaintiffs brought suit in

1 Delaware in 2002, their counsel specifically thought about,
2 considered, and apparently drafted a complaint to be filed in
3 this court.

4 Let me hand a couple e-mails up to Your Honor so you
5 can see. There is two. The first one is an e-mail from a
6 John Wiles to a Datavid, I guess, January 7th, 2002. Now,
7 that's before the three suits were filed in Delaware in April
8 and June of 2002, and in January it is clear. This is
9 Mr. Wiles, is, I believe, connected with Inline. He notes
10 the rocket docket. Further down, there is a discussion,
11 about halfway down the page, "They are getting ready to sue
12 on the rocket docket in Alexandria, Virginia."

13 THE COURT: Well, that is not the rocket docket.
14 The rocket docket is in Norfolk.

15 MR. MCFARLAND: I always thought the rocket docket
16 was the entire eastern district, Your Honor. And then if you
17 look at the second e-mail, Your Honor, from Mr. Kile later in
18 the month, on the second page, he notes that he's been before
19 the judges of the eastern district. He's quite familiar with
20 the litigation there. This is where we recommend filing an
21 action to get an early trial date.

22 These e-mails are critical because they underscore
23 that back in 2002 the plaintiff considered filing here in
24 this court, and thought it could do so, and even proceeded to
25 draft a complaint, and then for whatever tactical reason,

1 decided to file the three cases in Delaware. So they thought
2 about filing here, decided against it over three and a half
3 years ago, filed in Delaware, dismissed in Delaware as to my
4 client, because they didn't have subject matter jurisdiction
5 against the wrong Verizon entity, and then they didn't refile
6 in Delaware. They didn't add the proper Verizon defendants,
7 although that information was plainly available to them as to
8 who they really needed to sue, and they didn't do that.

9 They waited three and a half years, let the
10 litigation proceed in Delaware for that period of time, don't
11 like what's happened in Delaware, and now come to this court
12 and say, oh, my goodness, we want to now be in this court,
13 notwithstanding that we decided not to be in this court
14 almost four years ago, notwithstanding that we've litigated
15 for three and a half years, that the Court there is
16 absolutely familiar with all the issues, has dealt with this
17 file history, 16 plus years of patent prosecution have been
18 going on over these patents, Your Honor. That court is
19 familiar with it. They ask this Court to ignore reality, and
20 I submit this Court should not ignore reality.

21 THE COURT: I think it's curious that you have all
22 the books stacked up over there, and the plaintiff doesn't
23 have any. Think there might be some psychology at work
24 there?

25 MR. MCFARLAND: Absolutely, Your Honor.

1 THE COURT: My law clerk would enjoy reading that.

2 MR. McFARLAND: Well, the judge in Delaware, Your
3 Honor, did have to go through all this. That is part of what
4 is necessary, the file history here, for these four patents.
5 It was necessary for her to go through this for the claims
6 construction.

7 And the plaintiff comes, and I think it's a polite
8 word would be presumptuous, another word might be
9 disingenuous, to ask this Court to go through this kind of
10 effort and this kind of labor when another court has already
11 been dealing with these patents for three and a half years.

12 And I submit to the Court the only thing that makes
13 sense here is to transfer the action to Delaware, Your Honor.

14 THE COURT: All right.

15 MR. NOONA: May it please the Court, Your Honor.
16 Stephen Noona on behalf of the plaintiff. I'd like to
17 introduce Mr. Michael Plimack who is a partner in Heller
18 Ehrman from San Francisco. He has been admitted before the
19 Court pro hac vice, and he'll address the issues before the
20 Court. Thank you, Your Honor.

21 MR. PLIMACK: Good morning, Your Honor.

22 THE COURT: Good morning.

23 MR. PLIMACK: May it please the Court. I'd like to
24 start off by telling the Court why we filed this case in
25 Virginia. We filed this case in Virginia because the

1 plaintiff is a Virginia company. We filed this case in
2 Virginia because the defendants, that Verizon admits are most
3 important to this case, are in Virginia.

4 Now, what Verizon is trying to do is split this case
5 into a million pieces and ultimately to postpone the day of
6 judgment as long as possible.

7 Verizon --

8 THE COURT: How would they accomplish that by having
9 to transfer it to Delaware? Presumably, if they do, that
10 wouldn't be splitting it, it would be combining it with the
11 already pending case.

12 MR. PLIMACK: Your Honor, it would be --

13 THE COURT: And presumably since that case is
14 further along, it would result in an earlier resolution.

15 MR. PLIMACK: Your Honor, the reason this would be
16 split is two: First, the only court in which these
17 defendants can be sued in one case is this court in Virginia.

18 THE COURT: Well, "these defendants," you're getting
19 into the OTCs?

20 MR. PLIMACK: That's right, Your Honor.

21 THE COURT: Why should the OTCs be in the case?

22 MR. PLIMACK: The OTCs should be in the case because
23 they do substantial business in this district through the
24 Verizon entities that are located in Virginia.

25 The Verizon companies have a nationwide network that

1 is operated with a hub in Virginia.

2 THE COURT: Well, what difference does it make who
3 the OTCs are anyway? As the defendants pointed out, not only
4 are they not contracting with the consumer -- I'm trying to
5 think of an analogy. I mean, they're not as involved in the
6 process as the retailer would be, as Mr. McFarland pointed
7 out. They just happen to have a telephone line that's used
8 to transmit the service which the providers offer to the
9 consumer. And it, you know, could be anybody could furnish
10 that service.

11 I'm trying to think. I suppose if a truck delivered
12 a product from a manufacturer to the retailer, you could sue
13 the trucking company as easily as you could sue the OTCs in
14 this case, couldn't you?

15 MR. PLIMACK: Your Honor, the OTCs in this case are
16 not like a retailer. They are not like a distributor. They
17 have separate acts of infringement that make them on the hub.

18 THE COURT: What are the separation actions?

19 MR. PLIMACK: If I might put up a board, Your Honor,
20 I think I can show this, one of the claims from the patent.
21 If I could hand to Your Honor two claims, I think we will get
22 straight on this. I have handed this to opposing counsel.
23 Two of them. I'm handing up two of each, Your Honor. If I
24 could approach the board and put up the first claim.

25 Your Honor, this is the '596 patent. This is one of

1 the four patents at issue in the case. What we have done is
2 we have highlighted the language of the patent that shows the
3 portions of the patent that are operated directly by the OTC
4 companies.

5 If you look, this is claim -- the first one is claim
6 47. It is a dependent claim which depends on claim 21 so we
7 put claim 21 first. Claim 21 says, "A system for
8 communicating information between an external source of
9 information and a plurality of destinations of information
10 over a telephone wiring network used for passing telephone
11 signals in a telephone voice band between a plurality of
12 telephone devices and telephone exchanges."

13 Your Honor, that preamble of the claim is operated
14 by the OTC companies. They are the companies that operate
15 that portion of the claim. Similarly, the single interface,
16 which is the next portion that we've highlighted -- I won't
17 go into tremendous detail about the technical points, Your
18 Honor, but this signal interface is coupled between an
19 external source of information, which this could be the
20 internet, and the telephone wiring network.

21 The OTC companies operate that telephone wiring
22 network. The OTC companies operate the signal interface.
23 All of the subelements of this claim are operated by the OTC
24 companies. This is not a situation where a retailer simply
25 picks up somebody else's product and sells it to the public

1 or distributor that puts something in a truck and ships it.

2 These OTC companies, by their own acts, are
3 infringing these patents. Now, Verizon says, well, you
4 didn't include them in Delaware so they must not be necessary
5 parties. It is true that the internet service companies
6 themselves infringed the patents, but there is no requirement
7 for a patent holder to sue every infringer in every single
8 case.

9 The fact of the matter is this is the case to
10 address Verizon. This is the case to address the Verizon
11 national DSL system, and this is the only forum in which we
12 can do it.

13 THE COURT: Well, if you enjoin the providers, there
14 would be nothing for the OTCs to transmit, would there? So
15 if you get the injunction against them, that's the end of it.
16 You don't need relief against the OTCs.

17 MR. PLIMACK: Your Honor, it may be that we get a
18 complete relief against the internet service company.

19 THE COURT: Well, I mean, you've got to. I mean, if
20 they can't sell the service, there is nothing to be
21 transmitted by the OTCs.

22 MR. PLIMACK: The OTCs transmit not only the DSL
23 signals from the Verizon internet companies but they also
24 transmit signals from other internet service providers. The
25 OTC companies have acts of infringement that relate to a

1 variety of ISPs, and we are entitled, in our view, to go
2 against the infringers in the Verizon system in this case.

3 There may be a complete relief as to the acts of the
4 internet companies in Virginia, but there is also a relief as
5 to the OTC companies in Virginia. I'd point the Court to the
6 Verizon Online Services case, and I think this is an
7 important case for these purposes.

8 This was a case that was brought by --

9 THE COURT: Well, it seems to me that what you're
10 doing is you're asking the Court to increase the cost and
11 expense of litigation by adding these parties in and making
12 it more complex. I mean, litigation is already expensive
13 enough, and I think the courts have a duty to try and make
14 matters resolvable not only in a timely manner but in an
15 economical manner; otherwise, there is not going to be
16 anything left to try in this case. So regardless of whether
17 it is going to be mediated, because it costs too much to
18 litigate the case, all this does is make it worse.

19 You can get complete relief against the internet
20 service providers. You don't need the OTCs. And even if
21 you're entitled to it, it just seems to me to be an even more
22 cumbersome and complex method of accomplishing the same
23 thing, at best.

24 MR. PLIMACK: Your Honor, what Verizon is asking us
25 to do is to go after a remedy against these OTC companies, is

1 to sue them in 18 different federal courts across this
2 country. What we have done --

3 THE COURT: Well, you don't have to sue them, is the
4 point, just simply not necessary. What are you accomplishing
5 other than furnishing employment for a whole bunch of
6 different lawyers by suing the OTCs to begin with? You can
7 get complete relief -- I mean, to me it's much the same as
8 suing the corner computer stores who happens to sell an
9 infringing program, only made it slightly worse because here
10 they are not even -- these companies are not even contracting
11 with the consumer. They're just carrying over their lines
12 whatever somebody decides to ask them to carry. And by
13 carrying it you are saying infringing, maybe they are, but --

14 MR. PLIMACK: I'd make two points, Your Honor.
15 Point number one is, as I said, these OTC companies do
16 business with other internet service providers than these
17 Verizon companies, and they may have liability by virtue of
18 the business they do with AOL, Earth Link, and other ISPs.
19 So Verizon has not established that the remedy against the
20 OTC is exactly the same as the remedy against the Verizon
21 internet service providers.

22 The second point --

23 THE COURT: Well, it seems to me inescapable that if
24 you enjoin the ISPs from providing the service, that there's
25 no way that the OTCs could then infringe.

1 MR. PLIMACK: But if Verizon California, for
2 example --

3 THE COURT: And there ought to be less ISPs than
4 there are OTCs, and the only ones you've sued are amenable to
5 suit in Delaware. The Delaware corporations -- I mean, the
6 whole thing doesn't make sense to me, counsel, I'd be frank
7 to tell you. I think the courts have a duty to try to make
8 litigation less complex and less cumbersome, which is exactly
9 the opposite of what's being done here.

10 MR. PLIMACK: Your Honor, if the Court is inclined
11 to dismiss the OTC companies, I would submit that this case
12 still belongs in Virginia for the simple reason that in the
13 cases that were cited by the parties, there is not a single
14 case in which this Court has transferred a case that was
15 brought by a Virginia plaintiff, regardless of the location
16 of the defendants.

17 THE COURT: Yeah, but you elected Delaware to sue
18 two others, so you can hardly complain that would be
19 burdensome to you to bring suit in Delaware when you've
20 already done it.

21 MR. PLIMACK: If I could respond, Your Honor.

22 THE COURT: You're swimming upstream, counsel. I
23 guess you realize that.

24 MR. PLIMACK: It sounds that way, Your Honor, but if
25 I could be heard on that particular point. Our client sued

1 the parent Verizon Communications, and Verizon said, "You
2 sued the wrong company. This company doesn't do the acts
3 that infringe the patent." We went back to the drawing board
4 and we looked at the Verizon companies that do infringe the
5 patent, and lo and behold, those companies are in Virginia.
6 The case that was brought in Delaware was brought against
7 companies that could be sued in Delaware. These are
8 companies that can be sued in Virginia, and the cases --

9 THE COURT: And also in Delaware.

10 MR. PLIMACK: There are Delaware corporations among
11 the defendants, that's right, Your Honor.

12 THE COURT: But I mean, among the ISPs?

13 MR. PLIMACK: That is right.

14 THE COURT: Now, apparently, best I can figure out
15 from this complex set of facts, there may be two OTCs which
16 arguably could only be sued in Delaware and two which
17 arguably only be sued in Virginia.

18 MR. PLIMACK: If I could put a chart up, Your Honor,
19 I think I can illustrate this point. I have one more chart
20 to show Your Honor. If I may stand this up, and I'll put
21 another chart on the board, Your Honor. The top line of
22 these companies are these ISP and so-called service
23 companies, and although some are incorporated in Delaware, as
24 you can see from this chart, they are located in Virginia.

25 THE COURT: Some are. Now, isn't it correct that

1 every one of the companies on the top part of your chart are
2 amenable to service of process in Delaware?

3 MR. PLIMACK: Your Honor, I know for a fact that
4 some are. I cannot represent to the Court that they all are,
5 and perhaps --

6 MR. MCFARLAND: I've got a chart, Your Honor, and I
7 don't mean to interrupt, but I've got a chart, if I can hand
8 up to the Court, that lists the state of incorporation for
9 every defendant and the principal place of business.

10 THE COURT: Well, if you're going to hand me this
11 chart, counsel, you should be prepared to answer that
12 question.

13 MR. PLIMACK: I will accept Mr. McFarland's
14 representation.

15 THE COURT: I'm going to assume that every company
16 on the top of the chart is amenable to service of process in
17 Delaware, but that's the question that you should be able to
18 answer if you come in to court and argue it.

19 MR. PLIMACK: Your Honor, we created this chart to
20 show that the convenience of the parties and witnesses are
21 clearly served by having this case in Virginia. These
22 companies do business in Virginia, and, again, I would --

23 THE COURT: Are you moving to transfer the Delaware
24 case to Virginia?

25 MR. PLIMACK: We are not moving to transfer the

1 Delaware case to Virginia. The Delaware case was brought
2 against the defendants that were amenable to suit in
3 Delaware. But, Your Honor, the cases make very clear that
4 the plaintiff has a choice. The plaintiff has a choice of
5 forum particularly when the plaintiff is a Virginia
6 corporation, and the Virginia corporation here is Inline. It
7 has sued these companies that either have a principal office
8 in Virginia or a substantial presence in Virginia.

9 As the Verizon Online Services case made clear, this
10 is an important case for the following reason: This is a
11 case that Verizon Online Services, which is another name for
12 the first company, Verizon Internet Services, sued in this
13 court. It sued a Michigan company that did business in
14 Michigan. That Michigan company was sending spam e-mails
15 throughout the country. And the Court -- the Michigan
16 defendant moved to dismiss itself from the case and also
17 moved to have the case transferred to Michigan, said we have
18 no contact with Virginia.

19 Verizon came into this court and said the following:
20 They said we have a nationwide system. We have seven e-mail
21 servers in Virginia. This is where we operate our online
22 services from this district. And on that basis this Court
23 refused to transfer the case. And in that case the court
24 remarked on the fact that Verizon's choice to come to
25 Virginia, it's home turf, to litigate that case, was a

1 significant fact.

2 Now when it wants to delay the day of reckoning, it
3 says, no, you can't sue us in Virginia, even though we have
4 this nationwide system that's run from Virginia.

5 THE COURT: Well, I don't know that they are trying
6 to delay the day of reckoning, counsel. The case has been
7 going on in Delaware. A lot of work has been done in
8 Delaware.

9 MR. PLIMACK: I'd like to address that point, Your
10 Honor, if I might.

11 THE COURT: I mean, I don't find that particularly
12 significant because you're the one that chose Delaware to
13 begin with.

14 MR. PLIMACK: Your Honor, there is no requirement
15 that a patent holder bring every lawsuit on its patent in the
16 same district court.

17 THE COURT: Well, I tell you, do you think that the
18 district courts are going to sit still and let you file a
19 case against every internet service provider in a different
20 court around the country and see which one you can get the
21 judgment first, and to see if you lose in one district, you
22 might win in another, and do you think that that is what
23 these district courts are going to permit you to do?

24 MR. PLIMACK: The cases recognize that the primary
25 factor is the location of the parties and the choice of the

1 plaintiff when the plaintiff is in that forum, but as Your
2 Honor remarked when Verizon was arguing, the speed of the
3 docket is a factor to be considered. The fact of the matter
4 is, we have a case in Delaware that's been pending for three
5 and a half years. There is no trial date that has been set
6 yet.

7 And the Court has remarked that the magistrate judge
8 who was handling that case, which is the only magistrate
9 judge, is extremely busy. I would like to hand the Court an
10 order from the Delaware court which talks about this very
11 issue, if I might.

12 The reason I submit this is if this case is
13 transferred to Delaware, the magistrate judge is not going to
14 be handling this case. The arguments about that Verizon
15 makes about judicial economy, that a judge is climbing the
16 learning curve, the district court in Delaware as a matter of
17 practice assigns its case to the four district judges in that
18 court. To the extent that the Court finds that a matter is
19 amenable to treatment by someone other than the district
20 court, this order which was entered in September of 2004,
21 says that the cases will be assigned to a panel of special
22 masters, in paragraph 2 of the second page. There is no
23 provision under Delaware practice of assigning a case to the
24 magistrate judge.

25 In fact, if you look at the first page of this

1 document in the fourth "whereas" clause, it says, "Given this
2 Court's significant docket of complex intellectual property
3 cases, and given that this court's magistrate judge is
4 routinely scheduling hearings and mediation calendar six to
5 eight months out, the need to appoint special masters to
6 achieve these stated and important goals is clear."

7 In Delaware, you have to wait as long to get a
8 motion scheduled as you do to get the trial in this court.
9 That is a factor under the cases, and that was, of course, a
10 reason for filing in this court. It was not the primary
11 reason. The primary reason was the location of the parties
12 and the fact that the plaintiff is a Virginia corporation.
13 Verizon says we are somehow running away from Delaware. If
14 there is a ruling of the Delaware court that's entitled to
15 collateral estoppel effect, that will follow us wherever we
16 go. The idea that we are somehow running away from this
17 judge is just not accurate.

18 THE COURT: That's not really the issue. The issue
19 is that the judge in Delaware has made certain rulings
20 which -- and I don't know what the status is of those
21 rulings, whether it was a report and recommendation, or
22 whether he made a final ruling, or whatever it is, but that's
23 subject to being the law of the case whether you have a
24 special master or not. You've got the law of the case. I
25 don't -- I mean, this court would normally handle even a

1 complex case in less time than that, for whatever reason.

2 But the point is what's disturbing to the Court is
3 that these cases have gone on in two different jurisdictions,
4 and you elected to proceed in the other jurisdiction. So as
5 far as I'm concerned, that wipes out any consideration that
6 you would otherwise receive as being a Virginia corporation
7 in order to proceed in Virginia. You were a Virginia
8 corporation, you chose to proceed in Delaware. So that
9 argument has no persuasive power whatever to me in this
10 instance.

11 MR. PLIMACK: The only thing I would say, Your
12 Honor, is we chose to proceed in Delaware against different
13 defendants. This is a case involving Virginia --

14 THE COURT: An ISP is an ISP.

15 MR. PLIMACK: But here we have a tort where the
16 Virginia defendant -- where the ISP defendants and the
17 service company defendants do business in Virginia, and this
18 Court has already found that it is a nationwide hub of their
19 broadband services.

20 This is the only court in which we can sue the OTC
21 defendants, and I realize there is a motion to dismiss those
22 defendants which the Court has not decided, but I will point
23 out, as the Court is aware, the first factor in a transfer
24 motion is can you sue the defendants in the chancery court.
25 If you can't sue the defendants in the chancery court --

1 THE COURT: The necessary defendants.

2 MR. PLIMACK: Well, there are some cases, Your
3 Honor, where there have been stays against retailers and
4 distributors, I admit that. But, again, as we showed, these
5 OTC defendants are not mere distributors and retailers. They
6 have independent acts of infringement. In addition, the
7 Virginia companies act --

8 THE COURT: The retailers have an independent act of
9 infringement when they sell the product.

10 MR. PLIMACK: Yes, they do, Your Honor, but here --

11 THE COURT: Like I'm saying, this is like saying
12 that -- I'm trying to think of a perfect analogy and I can't,
13 but one that comes to mind is the company that transports the
14 physical computer program from the -- I don't know what you
15 call it, I don't know what you call it -- the manufacturer of
16 the program, the creator of the program, whatever transports
17 that program from the creator of the program to the retailer,
18 seems to me to be somewhat analogous to the OTCs in this
19 case.

20 So in a patent case are you going to sue the
21 trucking company or the railroad or the FedEx or the postal
22 service, whoever transmits the program? That is what you are
23 talking about here.

24 MR. PLIMACK: There are cases, Your Honor, where the
25 retailers and distributors have been stayed so that the rest

1 of the cases have been transferred, but those cases do not
2 involve a Virginia plaintiff, doesn't involve cases --

3 THE COURT: As I said, whatever advantage you have
4 as to Virginia plaintiff was wiped out when you, the Virginia
5 plaintiff, filed suit against the ISPs in Delaware.

6 MR. PLIMACK: But --

7 THE COURT: And initially you chose to try to
8 include Verizon. You just chose the wrong entity. So you
9 don't have any advantage as being a Virginia plaintiff having
10 chose to go that route. You're asking the Court to duplicate
11 what another Court is doing, and that's, per se, an
12 unattractive alternative. What's to say that you couldn't
13 find another ISP and sue them in yet another court?

14 MR. PLIMACK: Well, it would depend on where the ISP
15 is located, Your Honor. We might only have jurisdiction over
16 them in another place and --

17 THE COURT: An ISP? I mean, an ISP is going to be
18 furnishing services all over the country. Maybe there is an
19 ISP who only furnishes services in limited parts of the
20 country, but that would be sort of unusual, wouldn't it?

21 MR. PLIMACK: I guess all I can say, Your Honor, is
22 that we've prepared this chart, and we have shown, I believe,
23 that there is no contradiction from Verizon that these ISPs
24 and services companies do business -- this is the place where
25 the hub is, that plus the fact that the plaintiff is a

1 Virginia company makes this a special case, even though
2 Inline chose to sue two different ISPs in Delaware the first
3 time around.

4 THE COURT: Well, they chose to sue this ISP in
5 Delaware the first time around.

6 MR. PLIMACK: Well, we dispute that, Your Honor. I
7 mean, we sued a Verizon --

8 THE COURT: You mean, you just -- who were you
9 trying to sue when you sued Verizon in Delaware initially?

10 MR. PLIMACK: We sued the parent company.

11 THE COURT: But weren't you trying to enjoin Verizon
12 as an ISP when you sued them in Delaware?

13 MR. PLIMACK: We were trying to enjoin --

14 THE COURT: I mean, do I need to look at that
15 complaint?

16 MR. PLIMACK: It wasn't just their activities as
17 ISP, it was their activities as a service company, it was
18 their activities as an OTC company. It was all the
19 activities.

20 THE COURT: It did include their activities as an
21 ISP?

22 MR. PLIMACK: It did, Your Honor, but in that case
23 we believed that we could do the whole litigation against
24 this one entity in one court. Having been told by Verizon
25 that we couldn't, we went back to the drawing board and

1 looked at where we could do a case against the whole Verizon
2 ball game, and it actually turns out that the only court
3 where that can be done is Virginia because these services
4 companies act as an agent for the OTCs. They enter contracts
5 on behalf of the OTCs.

6 We've made quite an evidentiary showing in our
7 opposition in motion to dismiss, and although Verizon refused
8 to give us jurisdictional discovery, we've nonetheless showed
9 the substantial contacts of the OTC companies through the
10 services companies with Virginia, which is the same reason
11 this Court allowed Verizon to sue Michigan spammers in
12 Virginia. This is the court where the whole case can be
13 tried at once. And as I said at the outset, we are not
14 required to sue these companies all over the country, if, in
15 fact, we can't get complete relief against the internet
16 services company.

17 Your Honor's concern about conserving judicial
18 resources is best served by having this one lawsuit heard in
19 Virginia. Whatever rulings have come out of Delaware that we
20 are bound by as collateral estoppel, we are bound by here,
21 and the fact of the matter is the Delaware case --

22 THE COURT: How could it be collateral estoppel if
23 the parties are different?

24 MR. PLIMACK: Well, it may or may not, Your Honor.

25 THE COURT: These parties weren't even before the

1 Court there? How could it be collateral estoppel?

2 MR. PLIMACK: I'm not saying that it is collateral
3 estoppel. All I'm saying is they are saying that we are
4 attempting to run away from some rulings, and what I'm saying
5 is that if we are bound by rulings, they follow wherever we
6 go; if we are not bound by the rulings, then we are not bound
7 by the rulings.

8 THE COURT: Well, why haven't you moved to transfer
9 the Delaware case to Virginia?

10 MR. PLIMACK: Well, we filed the lawsuit in
11 Delaware. We filed -- our client, not -- my firm was not
12 personally involved in that case. My firm is not counsel of
13 record in the Delaware case.

14 THE COURT: Well, your client.

15 MR. PLIMACK: And I just wanted to clarify when you
16 say "we filed," it wasn't our firm, but our client filed the
17 case in Delaware and chose that forum for a case against
18 those particular defendants. That was a forum where those
19 defendants are being sued.

20 THE COURT: That is no good, counsel. That is no
21 good at all. They could say that. They could file against
22 ISPs -- I don't know how many ISPs there are that you can
23 claim an infringing, but you could sue every one of them
24 where you chose, all over the country, and we could have I
25 don't know how many different suits going on over the same

1 pattern, the same nature of infringing. It would make no
2 sense at all.

3 MR. PLIMACK: But on the other hand, this is the
4 only court where we can sue the entire Verizon system.

5 THE COURT: Well, you keep saying that. It's the
6 only court in which you can sue the OTCs. You can sue
7 everybody else in Delaware except the OTCs, and you can sue
8 on it, apparently, and I haven't looked into this, but it may
9 be that you can only sue two OTCs in Virginia and the rest of
10 them you can't sue. You sued what, 18?

11 MR. PLIMACK: 18 OTCs.

12 THE COURT: Two of them could apparently be sued in
13 Delaware and two of them for sure can be sued in Virginia.
14 We don't know about the rest.

15 MR. PLIMACK: That's true, Your Honor. I would say
16 that we've met our prima facie burden on jurisdiction.

17 THE COURT: Well, maybe you have. That's why
18 dismissing the case is difficult. All right. Do you have
19 anything new?

20 MR. PLIMACK: May I confer with my co-counsel one
21 second, Your Honor, before stepping down?

22 THE COURT: You may.

23 MR. PLIMACK: Thank you. Your Honor, unless there
24 are further questions from the Court, I conclude.

25 Thank you, Your Honor.

1 THE COURT: Do you have anything further,
2 Mr. McFarland?

3 MR. MCFARLAND: Very briefly, Your Honor.

4 THE COURT: I don't see how I can dismiss the OTCs.

5 MR. MCFARLAND: I'm not asking you to dismiss the
6 OTCs at this point, Your Honor.

7 THE COURT: Well, what are you asking me to do?

8 MR. MCFARLAND: I'm asking you to transfer this case
9 to Delaware, let the Delaware court deal with the motion to
10 dismiss the OTC defendants that's been filed already and
11 fully briefed.

12 THE COURT: That would be a different motion in
13 Delaware.

14 MR. MCFARLAND: No, Your Honor. This Court -- the
15 Court pointed out, if you'll look at the chart here with the
16 Verizon defendants -- first off, let me say this so there is
17 absolutely no dispute. Every one of the critical defendants,
18 the ISP defendants, and I don't think these two are, per se,
19 critical, but if the plaintiff says they are, we will take
20 that for purposes of this motion, what they call the DSL
21 service companies, every one of them is incorporated in
22 Delaware and absolutely amenable to suit in Delaware. That's
23 the first most important.

24 With respect to the OTC defendants, there are 18 of
25 them; two of them, the same number that plainly are subject

1 to jurisdiction in Virginia, are plainly subject to
2 jurisdiction in Delaware. They're Delaware entities. So to
3 the extent the plaintiff thinks now all of a sudden after
4 three and a half years of litigation where they didn't think
5 they needed OTCs as defendants, to the extent they now claim
6 they do need OTCs, they have at least two OTCs in Delaware,
7 the same number that they have in Virginia.

8 THE COURT: Well, we don't know how many they have
9 in Virginia.

10 MR. MCFARLAND: And maybe they have more in Delaware
11 than they would in Virginia, Your Honor. But the point is
12 they are not necessary defendants. Now, Your Honor, I think,
13 does have the right analogy in looking at the OTCs. They are
14 not even like the retailer of the product. They are, at
15 best, a transporter. And, in fact, there is another
16 distinction that needs to be made, Your Honor, unlike a FedEx
17 or a DSL or a Norfolk Southern who transports, the OTCs are,
18 quote, transporting pursuant to federal tariff. It's a
19 requirement.

20 So there is no direct contractual relationship even
21 as to the shipping like there is when I give a package to
22 FedEx and they are allegedly transporting the offending
23 product in that sense. This is all done -- Mr. Plimack held
24 up the claims construction. Number one, as this Court knows,
25 you can't just look at the claims in isolation. You have to

1 look at them in totality. And what the OTCs are doing here
2 in providing this allegedly infringing aspect is pursuant to
3 tariff service. And it is just one -- Verizon Virginia
4 provides it in Virginia, Verizon Maryland provides it in
5 Maryland, Virginia West Coast may provide it in California,
6 et cetera, but they are not the necessary parties to this
7 case.

8 And so what this Court should do is to transfer this
9 action to Delaware and stay it as to the two Virginia OTCs.
10 But the idea of litigating --

11 THE COURT: Stay it as to how many OTCs?

12 MR. MCFARLAND: You only need to stay -- the two
13 that are plainly --

14 THE COURT: Why shouldn't we stay it as to all of
15 them?

16 MR. MCFARLAND: If the Court thinks that's
17 appropriate --

18 THE COURT: I don't see how I can dismiss them
19 because I haven't decided the motion to dismiss.

20 MR. MCFARLAND: No, I'm not saying you should
21 decide.

22 THE COURT: Well, I mean, if I stay it as to some
23 and not as to others, I would be in effect deciding the
24 motion to dismiss.

25 MR. MCFARLAND: Oh, no, Your Honor. I think the

1 Court when it transfers the case can transfer the motion to
2 dismiss undecided for the Delaware court to deal with. And
3 if the Delaware court thinks further briefing is needed, it
4 certainly can request that.

5 What I'm saying is there are two Virginia OTCs that
6 we admit this Court plainly does have jurisdiction over. I
7 think the Court can stay the case as to the two Virginia OTC
8 defendants whom it plainly has jurisdiction over, and let the
9 proceedings go forward in Delaware. And if the plaintiff
10 obtains certain rulings and then they decide they want --

11 THE COURT: Then why shouldn't I stay it as to all
12 of them in Virginia? That doesn't mean that the plaintiff
13 can't pursue them in Delaware, the fact that I've stayed them
14 in Virginia.

15 MR. MCFARLAND: And the plaintiff could do that,
16 Your Honor. I was trying to make it, I think, a step easier
17 for the Court, but either way is fine. But what this Court
18 clearly needs to do is to transfer this case. The crux of
19 this case is the ISPs.

20 I mean, it is very telling that this case has been
21 proceeding for years, when some of these OTCs provide this
22 same service for not just the two Verizon ISPs, but they
23 provide it for AOL and Earth Link, and yet the plaintiff
24 didn't have the need to bring them into the AOL and Earth
25 Link suits in Delaware.

1 The final point I'll leave the Court with, when
2 these cases were -- the three of them were filed in Delaware,
3 AOL is a Virginia company. Its main headquarters is in
4 Arlington, Virginia. Plaintiff made a conscious decision in
5 2002, after initially thinking it was going to file in
6 Virginia -- that's what those e-mails indicate -- it made a
7 conscious decision initially to file all three cases in
8 Delaware.

9 And the only reason we are now before this Court on
10 one of the cases is not because overnight the plaintiff
11 realized it was a Virginia corporation. In fact, the
12 plaintiff is now, if you will, less of a Virginia corporation
13 than it was previously because the plaintiff's headquarters
14 are not even in Virginia anymore. The plaintiff has decided
15 it wants its principal place of business to be in the
16 District of Columbia. They just still happen to be
17 incorporated in Virginia. That is their only tie to Virginia
18 at the present time.

19 THE COURT: I don't think that their ties in
20 Virginia is particularly material.

21 MR. MCFARLAND: I agree, Your Honor. I think it
22 makes no difference whatsoever. They didn't bring this case
23 now because of their Virginia citizenship. They brought this
24 case in 2005 in this court for one reason and one reason
25 only. They don't like how it's been going in Delaware. And

1 as this Court has said --

2 THE COURT: Well, I don't know what you mean by how
3 it's been doing. I don't know if you are talking about speed
4 or rulings.

5 MR. MCFARLAND: I think more -- perhaps both, Your
6 Honor, but certainly more the latter. But the point is what
7 should not be -- the plaintiff should not be asking this
8 Court to do is to run parallel complex litigation with the
9 potential for incongruous decisions and the incredible
10 imposition upon this Court from dealing with four, and soon
11 to be five, patents in a highly complex, technological area
12 and thousands and thousands of documents, when a court in
13 Delaware has already dealt with this.

14 The only thing, Your Honor, that makes any sense in
15 the case is to transfer the case, the crux of the case
16 involving the ISPs to Delaware, and I leave to the Court -- I
17 think the Court could stay as to just the Virginia defendants
18 and transfer the entire cases of the OTCs. If the Court
19 thinks it wants to stay as to all the OTCs, that's fine.

20 THE COURT: All right. In this instance, I'll let
21 you reply to what he just said if you choose to, counsel.

22 MR. PLIMACK: Thank you, Your Honor. I'll be very
23 brief. The Court has obviously expressed the concern about
24 the OTC companies and whether we are really getting a
25 duplicate remedy and whether that's truly necessary.

1 We, as I said in my original argument, believe that
2 the OTCs have their own liability. It is not necessarily
3 co-extensive with the ISPs, the service companies. So that's
4 why we've included them here, and I stand by those comments.

5 THE COURT: But you didn't insert them in Delaware.
6 You haven't asked -- apparently you haven't even asked to
7 include them in Delaware.

8 MR. PLIMACK: Your Honor, my client can only sue so
9 many people at once. The case in Delaware --

10 THE COURT: Well, yeah. That is what we are trying
11 to get at, you can only sue -- they don't want to sue people
12 twice.

13 MR. PLIMACK: But, Your Honor, all I'm attempting to
14 say is that if the Court has a concern about the OTC
15 companies, this case could proceed in Virginia against the
16 non-OTC companies, and we could administratively sever them
17 for a later disposition, if Your Honor is right, that that
18 would resolve the issue.

19 THE COURT: It wouldn't resolve the duplication
20 issue, counsel, of having the case going on here at the same
21 time it is going on in Delaware. It makes no sense to me.

22 MR. PLIMACK: The only other point I would make,
23 Your Honor, in response, that AOL is a Virginia company, and
24 we have Earth Link in that case, as well. And that was a
25 case that was brought in Delaware because the belief at that

1 time was that that was a forum where all the defendants could
2 be sued in one place and one time. That is the same
3 motivation that is underlying this case.

4 THE COURT: Well, all the defendants that you
5 originally tried to sue in Delaware can be sued in Delaware.

6 MR. PLIMACK: That's true, Your Honor, except that
7 the Verizon company we sued, according to them, was the wrong
8 company.

9 THE COURT: Well, that's easily curable.

10 MR. PLIMACK: What we did to cure that was we
11 sued -- we sued the parent to get all of the subs. Now they
12 said you can't get the parent so now what we have done is we
13 have sued all of the subs. All of the subs are the
14 defendants in this case. All of the subs cannot be sued in
15 Delaware. That is why we brought this case here.

16 I have nothing further, Your Honor, unless there are
17 questions from the Court. The only thing -- there is one
18 last thing, Your Honor. I wanted to just point out the issue
19 of the schedule in the case, and I appreciate the Court -- we
20 may not have a schedule because we may not have a case here,
21 but I just wanted to point out that, and I have talked to my
22 opposing counsel, I think it is fair to say we are in
23 agreement. To the extent this case remains in Court, I think
24 all counsel believes that the schedule in the case must be
25 looked at by virtue of the fact where we are relative to

1 where we were when the matter was set. And I just wanted to
2 point out that before we sat down.

3 THE COURT: All right.

4 MR. PLIMACK: Thank you, Your Honor.

5 THE COURT: The Court believes that the most
6 important factor for it to consider in resolving the motion
7 to transfer is the potential duplication of effort between
8 this court and the court in Delaware.

9 There are any number of other factors that the Court
10 may consider. As indicated, the fact that the plaintiff
11 chose to initially sue in Delaware, including attempting to
12 sue Verizon in Delaware, leads the Court to discount any
13 importance of it being incorporated in Virginia. And at the
14 time -- perhaps at the time they filed the suit, maybe they
15 had the principal place of business there, but that's really
16 not an important point because I think by initially bringing
17 the suit in Delaware, they made a conscious decision not to
18 take advantage of the Virginia residence for the basis for
19 initiating these actions in Virginia, and having made that
20 choice and having subjected the Delaware court to
21 considerable time and effort in attempting to resolve that
22 litigation, it does not seem reasonable for this Court to
23 duplicate that.

24 So the Court's going to transfer the case to
25 Delaware. I'm not certain exactly what action the Court's

1 going to take as to the OTC defendants. That is something
2 that I'm going to have to look into further because I haven't
3 attempted to deal with the motion to dismiss the OTC
4 defendants.

5 And that being the case, it may be that the only
6 proper solution would be to simply stay the case as to all of
7 the OTC defendants, making it clear that any action of this
8 Court would not prohibit the defendant from seeking relief
9 from any of the OTC defendants in any other court, including
10 Delaware.

11 But I'm really not certain exactly what disposition
12 the Court will make with the case as to the OTC defendants at
13 this point, whether it should just transfer them all or two
14 of them to Delaware, or whether it should stay it as to all
15 of them or only two of them. I'll have to look into that
16 further, but I'm going to transfer the case to Delaware
17 because the overwhelming importance with the necessity to
18 avoid having two courts dealing with essentially the same
19 issue at the same time, and the Delaware court having had a
20 three and a half year head start should be closer to
21 resolution than this court.

22 I don't know if counsel have anything to contribute
23 in the way of further briefs on how the Court should handle
24 the transfer and with respect to the OTC defendants. If
25 either side wishes to make any contribution or file something

1 with the Court, I'll grant both sides until the 11th of
2 October to file whatever it is they'd like to file.. It is
3 not a matter of somebody filing and somebody replying. If
4 anybody wants to file something, they can both file it by
5 October 11th, meaning that I'm not going to enter an order
6 until after that.

7 MR. NOONA: Your Honor, may I raise one ancillary
8 point?

9 THE COURT: You may.

10 MR. NOONA: During the pendency of this period,
11 there are deadlines that will pass on the existing 16(b)
12 order. I have spoken with counsel. I think it would be
13 helpful for both sides if the Court would indicate that we
14 can suspend any of the deadlines until Your Honor's formal
15 ruling is in on the 16(b) scheduling order.

16 MR. McFARLAND: We would be in agreement with that,
17 Your Honor, and perhaps let me suggest this, and I'll talk
18 with counsel. It may be that we can come to an agreement
19 that we would present to the Court as to the OTC defendants.
20 I can't say that right here, and obviously I want to speak to
21 my client further, but I'd like to do that and then speak
22 with them because I have a sense, and I could be proven
23 wrong, but the guts of this case is with the ISPs, and that's
24 what the Court is transferring to Delaware.

25 THE COURT: Well, that's why I want to give both

1 sides an opportunity to address the Court on that issue
2 because it's not clear to the Court how to handle that
3 because I haven't dealt with the motions to dismiss the ISPs.
4 So I felt that this motion was sufficiently complex that it
5 should be dealt with as a separate entity, and so that's what
6 I've done.

7 So if counsel can agree as to how to treat the OTC
8 defendants without prejudice to complaining about the
9 transfer in the first place, that's fine with me.

10 MR. McFARLAND: And we'll stay the schedule, Your
11 Honor, for right now, the discovery and disclosures.

12 THE COURT: Right. Right. Well, having transferred
13 the case, and I'm not going to have the case proceed against
14 anybody, OTCs or anybody else, so having transferred it --

15 MR. McFARLAND: That's what I thought.

16 THE COURT: -- so there is no need for either side
17 to comply with anything in any pretrial order.

18 All right. Anything further?

19 MR. McFARLAND: I don't think so, Your Honor.

20 MR. NOONA: No, Your Honor.

21 MR. PLIMACK: No, Your Honor.

22 MR. McFARLAND: Thank you, Your Honor.

23 THE COURT: Want all these papers admitted into
24 evidence?

25 MR. McFARLAND: Just for the file, Your Honor.

1 MR. NOONA: Sandra, why don't we mark the plaintiffs
2 as a group and the defendant is only one.

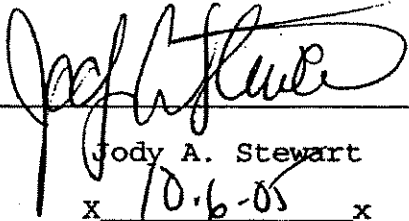
3 THE COURT: However you want to mark them is fine.

4 (The documents were received in evidence and marked
5 as Plaintiff's Exhibit No. 1 and Defendant's Exhibit No. 1.)

6 (Hearing adjourned at 11:52 a.m.)
7

8 CERTIFICATION
9

10 I certify that the foregoing is a correct transcript
11 from the record of proceedings in the above-entitled matter.

12
13 X  X
14 Jody A. Stewart
15 X 10.6.05 X

16 Date
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JODY A. STEWART, Official Court Reporter